RECENT CASES

BANKS AND BANKING.

Delay in Presenting Check

An action was brought by an original creditor against the debtor. Defendant, the debtor, had agreed to send, and did send a check covering the amount of his indebtedness to plaintiff's attorney. The latter, instead of presenting the note for payment, indorsed and negotiated it. Two days later the bank on which the check was drawn failed, and plaintiff sued on the original debt. The defence was that by plaintiff's action in not presenting the check, defendant was relieved of liability; and the Court held that the original debt was not revived by reason of the attorney's non-presentment of the check. "Delay in presentment of a check will relieve the drawer of liability, where he has been injured by the delay. *Kramer* v. *Grant,* 111 N. Y. Supp. 209. This principle thus stated by the Court has been well settled by a long line of decisions (*Murphy* v. *Levy,* 23 Misc. Rep. 147; *Carroll* v. *Sweet,* 128 N. Y. 19).

BILLS AND NOTES.

Additional Promise as Affecting Negotiability

In the case of *Smith Louis Gin and Machine Co.* v. *Badham* (South Carolina), 61 S. E. 1031, the instrument contained a "promise to pay to the order of V. C. Badham $760.66 negotiable and payable at the bank in D without offset with interest * * * with all expenses, if suit be instituted for collection of this note."

The decision holding the note non-negotiable, was based upon the prior mercantile law decisions of South Carolina, that State not having adopted the "Uniform Negotiable Instruments Law."

Prior to the Negotiable Instruments Law the question has arisen in numerous jurisdictions, some of which had adopted the same ruling as the principal case. *Overton* v. *Tyler,* 3 Barr. 346 (costs of collection); *Woods* v. *North,* 84 Pa. St. 407; *Pace* v. *Gilbert School,* 118 Mo. App. 369 (attorney's fees for collection) while others had held the paper to be negotiable notwithstanding the promise to pay additional expenses. *Adams* v. *Addington,* 16 Fed. 89 (attorney's fees for collection); *Dumas*

BILLS AND NOTES (Continued).

v. *People's Bank* (Ala.), 40 So. 964 (costs of collection and attorney's fees); *Stapleton* v. *Louisville Banking Co.*, 95 Ga. 802 ("all costs and 10 per cent. on amount for counsel fees, if placed in the hands of an attorney for suit").

Bona Fide Purchaser Blank Notes

A bank allowed a lumber company, in which A was interested, to overdraw its account. To meet these overdrafts A made notes payable to the order of the lumber company. When the cashier of the bank received them they were blank as to date, time of payment, and amount. He filled in the blanks as occasion required, the lumber company endorsed the notes and the bank placed the proceeds to the credit of the company. After maturity the notes were transferred to the plaintiff, who seeks recovery on the ground that the bank was a bona fide holder, and that therefore he is entitled to be so considered.

Held, that under the Negotiable Instruments Law, providing that one can be a holder in due course of a negotiable instrument only where "it is complete and regular on its face" (Sec. 52, 1 N. Y. Laws 1897, p. 719, c 612), the bank was not a bona fide holder. *Hunter* v. *Bacon,* 111 N. Y. Sup. 820.

This case is interesting as being one of the first judicial interpretations of Sec. 52, 1 of the Negotiable Instruments Law (*Elias* v. *Whitney,* 98 N. Y. Sup. 667; *Trustees of Bk.* v. *McComb,* 54 S. E. 14). Under the above interpretation the section accords with the Law Merchant as it existed in New York prior to the passage of the Negotiable Instruments Law. (See, *Davis Sewing Machine Co.* v. *Best,* 105 N. Y. 50; *Ledwich* v. *McKim,* 53 N. Y. 307.)

CONTRACT.

Consideration —Bona Fide Disputes— Compromise

Defendants, real estate agents, made agreement with plaintiff for his services in negotiating for the sale of certain lands in the hands of defendants. Parties disagree as to what the terms of the original agreement were and defendant contends that there was a compromise. *Held,* instruction was error. Compromise of a bona fide dispute as to a claim is itself a good consideration without reference to the original controversy. *Kelly* v. *Hopkins,* 117 N. W. 396. (Cf. *Newberry et al.* v. *Chicago Lumbering Co.,* 117 N. W. 592.)

The above doctrine is the prevailing one, and upon examina-

CONTRACT (Continued).

tion will be found to be sound, although some courts maintain a contrary rule, on the ground that such a compromise is no consideration for the new agreement, unless it subsequently appear that the disputed claim was in fact a valid one. (*Fink* v. *Smith,* 170 Pa. 124.) But this proposition is too narrow and is advanced only by reason of a mistaken view of what the consideration is in such compromise agreements. Every individual has an absolute right to bring suit whenever he believes that he has a good cause of action. In compromise agreements it is a detriment to give up the right to bring suit, although that right may not have involved a valid right of action (*Callisher* v. *Bischoffsheim,* L. R. 5 Q. B. 449). Therefore the existence of such a detriment is determined not by the validity of the right of action, but by the honesty of belief in it, as it is on the latter that the right to bring suit depends. It is that detriment (which also involves the benefit to the other party of not having to defend the suit, whether well founded or not) which constitutes a good consideration for compromise agreements. Accord: *Demars* v. *Land Co.,* 37 Minn. 418; *Grandin* v. *Grandin,* 49 N. J. L. 508; *Connecticut River Lumber Co.* v. *Brown,* 68 Vt. 239.

Consideration Moving from Third Persons

In an action on an agreement, executed by one to his mother and sister to pay them an annuity, which recited, "for value received, I hereby promise to pay," the defendant admitted the receipt of large sums of money from his father, at whose request he made the agreement.

Held, (1) that the words "for value received" imported a sufficient consideration to sustain the action in the absence of evidence to the contrary, and (2) that as the promise was made directly to the plaintiff; she could enforce it though the consideration moved from the father. *Hamilton* v. *Hamilton,* 112 N. Y. Sup. 10.

(1) The doctrine that the words "for value received" in a written contract are *prima facie* evidence of a sufficient consideration is well established in the United States. (See *Rice* v. *Rice,* 60 N. Y. Sup. 97; *Jones* v. *Holliday,* 11 Tex. 412; *Thrall* v. *Newell,* 19 Vt. 202.)

(2) The English rule laid down in *Tweddle* v. *Atkinson,* 1 B. & S. 398, that "no stranger to the consideration can take advantage of a contract though made for his benefit," is not followed in the great majority of American jurisdictions where

CONTRACT (Continued).

it is held that if the promise is *made directly to the plaintiff* he may recover upon it though the consideration moved from another. *Rector* v. *Teed,* 120 N. Y. 583; *First Nat. Bk.* v. *Chalmers,* 144 N. Y. 432; *Palmer Sav. Bk.* v. *Ins. Co.,* 166 Mass. 189; *Van Eman* v. *Stanchfield,* 10 Minn. 255.

For a discussion of the conflicting doctrines where the promise is not made directly to the plaintiff see *Lawrence* v. *Fox,* 20 N. Y. 268; 15 *Harv. Law Rev.* 767; *Anson Contracts* (2nd Am. ed. 1907) p. 282.

As the promise in our principle case was made to the plaintiff the decision, while in conflict with the English doctrine, is supported by the great weight of American authority.

Contract for Lobbying, Nonenforceable as Against Public Policy

Plaintiff by interviewing mayor, soliciting members of Councils, arranging meetings of committees and speaking before them, succeeded after several years in effecting a sale of the Bienville Water Supply Company's property to the city.

Plaintiff alleges that said services were rendered under a contract with defendant, and seeks to recover for them. *Held,* Councils is the legislative body of a city. The contract was for lobby services and, as such, is void as against public policy. *Burke* v. *Wood,* 192 Fed. 533.

Persons whose rights will be affected by proceedings of the legislature, have an undoubted right to urge their arguments before that body, personally or through counsel, and contracts for such services are free from judicial criticism. *Miles* v. *Thorne,* 38 Cal. 335, 339. But when such services consist of personal solicitations of the members of a legislative body, for the purpose of unduly controlling legislation otherwise than by appealing to the legislators' reason, they become what is commonly called lobbying. *Trist* v. *Child,* 21 Wall, 441. Some courts go so far as to hold all contracts for lobbying void on the ground that they tend to encourage corrupt and underhand methods, whether such appear to have been employed or not. *Mills* v. *Mills,* 40 N. Y. 543; *Clippinger* v. *Hepbaugh,* 5 W. & S. 315. A less strict rule is that they are void only when it appears that they contemplated indirect methods, or that such were actually exercised. And so many courts hold that any provision in the nature of a contingent fee avoids the contract, as being likely to lead to indirect methods. *Critchfield* v. *Bermudez Paving Co.,* 174 Ill. 466, 478. The same is true as to any secrecy or concealment as to the relation between the party

CONTRACT (Continued).

rendering and the party paying for such services. *Marshall* v. *B. & O. R. R. Co.,* 16 How. 314, 334.

The above rules do not conflict in principle as all are based on the proposition that contracts for influencing legislators, otherwise than by appealing to their reason are against public policy. They vary only in what they consider to be sufficient indication of such influence, to render a contract unenforceable.

Impossibility of Performance

Defendant, having made a note to plaintiff's agent, for the purchase price of two mules, contracted to pay off the note by cultivating certain land, and paying plaintiff's agent a share of the proceeds. Defendant pleads act of God, and impossiblity of performance owing to the swampy nature of the land, and the continuous and successive rains. *Held,* when a party voluntarily undertakes, and by contract binds himself to do an act or thing without qualification, and the performance thereof becomes impossible by some contingency which should have been anticipated and provided against in the contract, and such provision is not made, the non-performance will not be excused. *Gunter* v. *Robinson,* 112 S. W. Rep. 134 (Texas).

This decision falls under the doctrine, now well recognized, which was first clearly stated in the English case of *Paradine* v. *Jane,* Aleyn 26, where the Court held that where the law creates a duty or a charge, and the party is disabled to perform it without any default in him, there the law will excuse him; but where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. The case of *McGhee* v. *Hill,* 4 Port. (Ala.) 170, is practically a counterpart of this case of *Gunter* v. *Robinson,* for there it was held that the defendant was not excused from delivering a specified amount of corn, because of an unusual drought. See also *Eugster* v. *West,* 35 La. Ann. 119, and 9 Cyc. 627. Anson, in his latest edition, at page 396 *et seq.,* declares the rule as stated above to be the correct rule of law subject to three exceptions which relieve from liability: (1) where the law is changed subsequent to the contract; (2) where there is a destruction of the subject matter; (3) in the case of incapacity for personal service. The decision in the case under discussion, not falling within any of these exceptions, is therefore supported by the leading authorities, both English and American.

CONTRACT (Continued).

Marriage as a Consideration

Defendant promised plaintiff that if the latter would marry defendant's daughter he would give him $2000. All of this amount was paid except $100 for which defendant gave a note, and this suit is brought to recover that sum. *Held,* marriage is a good and sufficient consideration for a promise to pay money, and this is not such a contract as is invalid for reasons of public policy. *Lieb* v. *Dobriner,* 111 N. Y. Supp. 650.

The report of the case leaves us in doubt whether at the time the promise was made the plaintiff was already engaged to marry the defendant's daughter, or whether the engagement was subsequent. If the engagement had already been entered into, it would be against the New York doctrine to hold that there was any consideration. This point was squarely decided in *Gerlach* v. *Steinke, 22* Alb. L. J. 134, where it was held that since there was a pre-existing legal liability on the part of the plaintiff to marry the woman, there was no consideration to the defendant. This is of course contrary to the familiar English case of *Shadwell* v. *Shadwell,* 30 L. J. Rep. C. P. 145, where a recovery was allowed under such circumstances. The doctrine of *Gerlach* v. *Steinke* is to-day considered more consistent with the principles of consideration. The New York court in this case of *Lieb* v. *Dobriner* base their decision on the New York cases of *Wright* v. *Wright,* 54 N. Y. 437, and *Peck* v. *Vandermark,* 99 N. Y. 30, neither of which cases is a direct authority, since in each there is an additional element of consideration besides the marriage, and also the contracts are made directly between the man and woman, and in contemplation of their own marriage. But the case of *Chichester's Exec'x* v. *Vass's Adm'r,* 1 Munf. (Va.) 198, is decided upon almost identical facts with those of the present case, and recovery is allowed. All of these cases must, however, be distinguished from the so-called marriage brokerage contracts which public policy has required to be considered invalid, as for instance, the case of *Duval* v. *Wellman,* 124 N. Y. 156.

CONTRACTS.

Public Policy: Agreements as to Proposed Routes

Defendant and his associates were considering four possible routes for a railroad to be built by a company that they were about to incorporate. Defendant agreed to adopt one of said routes in consideration of plaintiffs giving him an option upon certain lumber lands along that route, in disposing of which defendant could obtain freight to be carried. *Held,* this contract is in effect between a railroad company and an outside individual. It violates no rule of public policy and is not void. *McCowen* v. *Pew,* 86 Pac. 893.

A railroad company is a quasi-public corporation and therefore owes a high duty to the public in selecting routes. But since it is only quasi-public, it owes a financial duty to its stockholders, as well as one of efficiency to the public, and it is therefore legitimate for a railroad company to enter into agreements fixing proposed routes for considerations consisting of money or real estate (*Louisville, etc., Co.* v. *Summer,* 106 Ind. 55; *Cumberland, etc., Co.* v. *Baab,* 9 Watts [Pa.], 458), provided such agreements do not overlook paramount public interests. *First National Bank, etc.,* v. *Hendrie,* 49 Ia. 402. But if such agreements are to the disadvantage of the public (*Fuller* v. *Dame,* 18 Pick. 472), or if such agreements are made by members of railroad corporations, as individuals, for their individual benefit, they are then void as against public policy. *Bestor* v. *Wathen,* 60 Ill. 138; *Reed* v. *Johnson,* 27 Wash. 42. The reason is that by such agreements matters of public interest are controlled by considerations that are merely personal. A contract of that kind amounts to an official performance by the man who in return receives a personal compensation, and as the office is a public one, it is a bartering away of public interests as well as a fraud upon the stockholders. The fundamental test as to whether such contracts are valid, is whether an agreement to perform an act by a public service corporation is supported by a consideration beneficial to the public.

Third Party Beneficiary

In the case of *National Surety Co.* v. *Foster Lumber Co.,* 85 N. E. Rep. 489 (Ind.), the trustees of a public school entered into an agreement with a contractor for the erection of a building. By the terms of the agreement, the contractor was to pay for all labor and material furnished. The defendant company became surety on a bond for the proper performance by the contractor of the

CONTRACTS (Continued).

agreement. The plaintiffs, having furnished material and not being paid by the contractor, sued the defendant company on the bond.

The Court held that "the intention is determinable from the terms of the contract and an agreement between two parties, whereby one of them undertakes to pay money to a third, is for the benefit of the third party and enforceable by him."

Further than the above statement no light is thrown by the Court upon the reason for the judgment. The jurisdictions which follow the law laid down above have gone directly opposite to the common law rule and apparently have given no reasons for their decisions. In the case of *Sample* v. *Hale,* 34 Neb. 220, the Court says, "It is a rule well established in this court that if one party makes a promise to another for the benefit of a third, the third party may maintain an action on it." See also *Kaufmann* v. *Cooper,* 46 Neb. 644, and *Brown* v. *Markland,* 53 N. E. Rep. 295.

In the cases of *Breen* v. *Kelly,* 47 N. W. Rep. (Minn.) 1067, and *Buffalo Cement Co.* v. *McNaughton,* 40 Hun, 74, it was held that the material men could not recover upon the bond.

CRIMINAL LAW.

Provocation to Justify Homocide.

In a trial for murder the evidence showed that deceased had without provocation knocked defendant down; that defendant arose, washed his face, and left deceased's barroom, where the trouble occurred, without answering deceased's request "to make friends;" that defendant, having procured a gun, returned two hours later, inquired for deceased, and went to a lunch room where deceased was; that defendant walked up to deceased without making any threats or hostile gestures or using any abusive language to deceased; that defendant refused deceased's offer to shake hands and be friends, whereupon deceased cursed defendant; that deceased having accused defendant of having a knife, defendant opened his hand and showed him that he had none; that deceased reached for a syrup pitcher and defendant for his revolver, that deceased struck defendant on the head with the syrup pitcher and that in the struggle which ensued defendant shot and killed deceased. The trial court left the question to the jury to determine whether or not defendant had provoked deceased and therefore was not entitled

CRIMINAL LAW (Continued).

to the benefit of the doctrine of self-defence. The Supreme Court overruled the objection that the evidence did not raise the issue of provocation. *Scott v. Short,* 46 Southern Rep. 1003 (La.).

This case must probably be regarded as an extension of the common law in this respect.

If the difficulty is provoked with a felonious intent, all right of self-defence is forfeited (25 Am. & Eng. Law, p. 270, sec. 3). In such cases the danger must be immediate and the defence not exceed the attack (Wh. Crim. Law, sec. 102).

Former hostile acts or threats or present verbal threats are not sufficient ground for apprehending danger, where there is no overt act indicating a present intention to execute the threats. Clark & Marshall Cr. Law, 2nd Ed., p. 400 and notes; *Mitchell* v. *St.,* 60 Ala. 26.

One against whom threats have been made by another is not justifiable in assaulting him unless the threatener makes some attempt to execute his threats (*State* v. *Rider,* 90 Mo. 54).

The Court refused to draw a line of demarcation between those acts which occurred before and which occurred after the parties came into presence. Since the test in these cases is whether the acts of defendant would be sufficient provocation to deceased as a reasonable man (Clark and Marshall, *supra,* p. 398), it is difficult to see how the acts of defendant before he cam einto deceased's presence and of which deceased did not and could not know, could affect the adequacy of the provocation.

EVIDENCE.

In the case of *Barrett et al.* v. *Magner,* 117 N. E. Rep. 245, the Supreme Court of Minnesota decided that a telephonic conversation is admissible in evidence when, from all the circumstances, the identity of the party answering the phone is established with reasonable certainty. Identification by admission of the party or by recognition of the voice is not essential; it is sufficient if the party carried on a conversation intelligently upon a matter which only the person sought to be identified could have done.

Telephone Conversation

This seems to be a reasonable extension of method of identification, as men have long been accustomed to rely upon this method of identification for business purposes.

FELLOW-SERVANTS.

Telegraph Operator in Charge of a Block

The line of a railroad company was divided for the purpose of operation into blocks, permissive and absolute. The block between Dingess and Hale was absolute and was in charge of a telegraph operator. The rules of the company made said operator responsible for the operation of trains within his block, and gave him absolute authority to hold trains until the block was clear. Rule 527 of defendant under "Instructions to Operators" read: "Operators * * * will not permit a train to enter a block following a train in the same direction until the preceding train has been reported as having cleared the block station ahead, except by order of the superintendent." The operator in charge of said block disobeyed order 527, and in the collision which resulted plaintiff's intestate was killed. *Salmons* v. *Norfolk & Western R. R.*, 162 Fed. 722.

The Circuit Court, S. D. W. Va. *held,* that the operator was a vice principal and not a fellow-servant of plaintiff's intestate and that his negligence in this respect was the negligence of the defendant.

This opinion, in the absence of a Supreme Court decision on the above facts, must be regarded as law. Care should be taken, however, not to extend it beyond the facts of the present case. (See Burdick on Torts, p. 160.)

The following cases in which it has been held that a telegraph operator is the fellow-servant of trainmen injured by reason of his negligence in transmitting orders, setting signals, etc., may be distinguished on the ground that the operator was there acting in a purely ministerial capacity in doing the act in which he was negligent. *McKaig* v. *N. Pac. R. Co.*, 42 Fed. 288; *Slater* v. *Jewett*, 85 N. Y. 627 (compare *Madden* v. *Ry. Co.*, 28 W. Va. 610, pp. 616-617); *Cincinnati, N. O. & T. P. R. Co.* v. *Clark*, 57 Fed. 125; *B. & O. R. R. Co.* v. *Camp*, 65 Fed. 952; *Dana* v. *N. Y. Cent. & H. R. R. Co.*, 23 Hun, 473; *Monaghan* v. *N. Y. Cent. & H. R. R. Co.*, 45 Hun, 113.

The following cases have held the telegraph operator not to be the fellow-servant of a trainman injured by reason of his negligence, on the ground that the railroad company is responsible for the reasonably safe operation of its road: *Flannegan* v. *Chesapeake & Ohio Ry. Co.*, 40 W. Va. 436; *Haney* v. *P., C., C. & St. L. Ry. Co.*, 38 W. Va. 570; *Hall* v. *Galveston, H. & S. A. R. Co.*, 39 Fed. 18; *Madden* v. *C. & O. R. Co.*, 28 W. Va. 610; *Lake Shore, etc., R. Co.* v. *Burtscher*, 8 Ohio C. C. (N.

FELLOW-SERVANTS (Continued).

S.) 137; *Frost* v. *Ore. Short Line & U. N. R. Co.*, 69 Fed. 936. *East Tennessee, V. & Ga. R. Co.* v. *De Armond*, 86 Tenn. 75, held likewise on ground that the operator and trainman were in separate departments.

INSANE PERSONS.

Capacity to Cover Bona Fide Mortgages

In an action for foreclosure the mortgagor's grantor was made a party defendant as claiming some interest in the land covered by the mortgage. Defendant claimed that his deed was void, as at the time of execution thereof he was of feeble mind.

Held, that the deed of a person whose mind is unsound, but not entirely without understanding, made before his incapacity is judicially determined, is not void but voidable. And the grantee may mortgage to an innocent third party and create a valid lien. *Maas et al.* v. *Dunmyer*, 96 Pac. 591.

This case, while governed by an Oklahoma statute, is interesting as showing the strong tendency of the Western States to codify the principles of the common law with which this decision is in accord.

The rule laid down in the early English cases is that a completed contract for the sale of lands made by an insane vendor, without notice of the vendor's insanity and for a fair consideration, will not be set aside unless the grantee is put in *statu quo* (*Addison* v. *Dawson*, 2 Vern. 678), and a *bona fide* purchaser for value from a fraudulent grantee of an insane person is in exactly the same position as one who purchases direct from an insane vendor. *Odom* v. *Riddick*, 104 N. C. 515. This doctrine is upheld by the great weight of American authority, *Blinn* v. *Schwarz*, 177 N. Y. 252 (*contra, Galloway* v. *Hendon*, 131 Ala. 280), though some jurisdictions hold that such conveyance may be avoided without placing the grantee in *statu quo*. *Gibson* v. *Soper*, 6 Gray, 279; *Crawford* v. *Scovell*, 94 Pa. St. 48.

For further cases on this subject see 22 Cyc. 1171, 1176.

Where the guardian of the insane person is considered as invested with the full legal estate of the ward, all conveyances made by the ward *after adjudication* on insanity are of course void. *In re Walker*, 1905, 1 Ch. 160.

LABOR DISPUTES.

Right of Persuasion

The right of the workingman to combine, to strike and to further his interests by agitation is universally recognized within certain broad limits. What those limits are is discussed in *Jones* v. *Van Winkle,* 62 S. E. 236, a typical labor-dispute case, in which striking employees had picketed plaintiff's factory, in order to deter others from applying for work. The lower court enjoined not only intimidation, but even argument; but the upper court struck out the latter restriction, following the trend of authority. The mass of decisions hold that equity will not enjoin strikers from persuading others to take their places so long as they do not resort to violence or commit nuisance. (*Gray* v. *Council,* 91 Minn. 171; Eddy on Combinations, p. 539.)

A few decisions seem to prohibit even argument, Federal courts have shown some tendency to stretch equity jurisdiction, and *Knudsen* v. *Benn,* 123 Fed. 636, enjoins persuasion as well as threat. The language of *Thomas* v. *Cincinnati,* 62 Fed. 803, would seem to be in accord, though applying it to the facts makes it a little less broad. There is also a conflict of authority as to the effect of motive in civil liability, which may account for some otherwise irreconcilable decisions. The present case ignores the idea of motives, and quotes *Nat. Protective Assn.* v. *Cumming,* 170 N. Y. 315, as authority. But at all events the decision with regard to persuasion is absolutely sound. It is unquestionably difficult to know just when argument becomes intimidation, and it is difficult to conceive of a purely philosophical picket, but each case, as the Court says, must depend on its own facts, and any equitable language infringing on the much-vaunted right of freedom of speech is unquestionably too broad.

PENALTIES.

Forfeitures Not Favored

A contract for the sale of real estate provided that, upon the vendee's failure to execute notes and a mortgage and to make a second cash payment, the money theretofore paid "is to be declared forfeited to the said party of the first part" (vendor). *Held,* that it was incumbent on the vendor, upon vendee's default, to declare a forfeiture to entitle her to retain said money.

"Forfeitures," said the Court, "are not favored either in law or equity, and if the intent is doubtful, will receive a strict con-

PENALTIES (Continued).

struction against those for whose benefit they were intended." *Walker* v. *Burtless,* 117 N. W. 39.

Both authority and principle seem to favor this decision. Since time, as the Court found, was not in the essence of a contract admitted by defendant, a mere failure to pay by the stipulated time would not of itself work a forfeiture (*Lincott* v. *Buck,* 33 Me. 530; *Shafer* v. *Nives,* 9 Mich. 253). Notice was necessary.

Equity interprets contracts so as to save forfeitures if possible, construing the provisions strictly. Here a forfeiture was to be declared under certain conditions, and as defendant did not declare a forfeiture at all, she was not entitled to retain the earnest-money (*Murphy* v. *MacIntyre,* 116 N. W. 197; *O'Connor* v. *Hughes,* 35 Mann. 334).

The provision for forfeiture is for the benefit of the vendor and not of the vendee (*Sigler* v. *Wick,* 45 Iowa, 690), and justice requires that its provisions, in case of doubtful intent, should be construed strictly against the protected party.

PUBLIC NUISANCE.

Plaintiff brought a bill for injunction to restrain defendant from obstructing an alleged highway. The defendant denied the legal existence of the road, and therefore the question was one of fact whether or not there was a nuisance, and whether or not the plaintiff had a right to maintain the action. *Held,* in consequence of the conflict of the testimony, as to the existence of the alleged public nuisance, the suit is dismissed, until the nuisance can be established at law. *Van Buskirk* v. *Bond,* 96 Pac. Rep. 1103 (Oregon).

Previous Trial at Law

The Court bases its opinion largely on the case of *McClain* v. *City of Newcastle,* 130 Pa. 546, where the plaintiff was driven to a trial at law, but it can hardly be said that this fairly represents the present law of Pennsylvania, for in *Sullivan* v. *Jones & Laughlin Steel Co.,* 208 Pa. 540, the Court dispenses with a previous trial at law, in spite of a strong dissenting opinion by Chief Justice Mitchell. A statute in England, that of 25 and 26 Vict. C. 42, has long since abolished the necessity of a previous trial at law, and gives the Chancellor the right to determine the disputed question himself, or direct an issue to a jury. Dr. William Draper Lewis, in an article in the Uni-

PUBLIC NUISANCE (Continued).

versity of Pennsylvania Law Review, vol. 56, p. 289, has traced the doctrine of a previous trial at law, showing how, in the case of nuisance, it was merely the outgrowth of a confusion between trespass on an easement and nuisance, caused by the fact that each of these wrongs was remedied by an assize of nuisance. In the case under discussion, the blocking of the way would technically be a trespass to an easement, and not a nuisance, hence historically the Court would be justified in sending the case to law. But it is very much to be doubted whether, in spite of the weight of authority supporting the rule at present (see 29 Cyc. 1228), the courts will continue to adhere to the delay-breeding doctrine, in cases where the Chancellor feels himself at all qualified to judge of the facts.

SALES.

Impossibility of Re-sale

The defendant in Connecticut ordered some jewelry from the plaintiffs through the latter's agent; the jewelry was to be shipped f. o. b. Iowa. When the defendant received the jewelry he had it examined and discovered that it was so stamped as to render its sale in Connecticut unlawful. The defendant returned the goods to the plaintiffs, who refused to receive them and sued defendant for purchase price.

Held, that if the goods substantially complied with the defendant's order, the fact that they were unsalable in Connecticut would not rescind the contract and the defendant would be liable for the purchase price. But if the goods, although in all other respects they complied with the defendant's order, were without his authority stamped in such a way as to render their sale in Connecticut unlawful, the defendant could refuse within a reasonable time to accept them. Statements in the printed order that the vendor would buy, replace or exchange goods did not deprive him of that right. *Moline Jewelry Co.* v. *Dinnan,* 70 Atl. Rep. 634.